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Supreme Court, U.S.
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No. 96-959

In The

Supreme Court of the United States

October Term, 1996

THE STATE OF TEXAS,

Petitioner,

v.

KENNETH RAY CLARK,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Kenneth Ray Clark, Respondent in the above numbered and entitled cause, by and through J. Rex Barnett, attorney of record on appeal, files this Brief in Opposition, and respectfully prays that the Court deny the State of Texas' petition for writ of certiorari in the above-numbered and entitled cause.

OPINION BELOW

The State of Texas seeks review of the opinion of the Texas Court of Criminal Appeals in *Kenneth Ray Clark v. State,* reported at 929 S.W.2d 5 (Tex. Crim. App. 1996).

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

I. Course of proceeding and disposition below:

The Respondent was convicted of the offense of Capital Murder and sentenced to death in cause number 044179D in the Criminal District Court Number Three of Tarrant County, Texas. The Respondent was sentenced on

February 19, 1992. The case was automatically appealed to the Texas Court of Criminal Appeals.

On May 22, 1996, the Court of Criminal Appeals issued its opinion vacating the Respondent's death sentence, finding that a veniremember, Elaine Jones, was improperly struck for cause from the jury panel as "the trial court could not rationally have concluded that the State discharged its burden to show Jones was unable to abide by the statutory scheme . . . " *Clark v. State*, 929 S.W.2d at 6. The Court of Criminal Appeals held that the removal of Ms. Jones violated the standard set out by this Court in *Wainwright v. Witt*, 469 U.S. 412 (1985).

The State filed a Motion for Rehearing with the Court of Criminal Appeals on July 10, 1996, which was denied without written opinion on September 18, 1996.

The State's Petition for Writ of Certiorari was timely filed with this Court on December 16, 1996.

The Respondent's Brief in Opposition is due on or before February 14, 1997.

II. Statement of Facts:

On January 9, 1992, the individual voir dire of veniremember Elaine Jones was held. During the questioning of Elaine Jones, the following occurred:

> *Prosecutor*: Are you morally against the death penalty?
>
> *Venireperson Jones*: Some what. It depends on the case.
>
> *Prosecutor*: Okay. What are your views on the death penalty?

Venireperson Jones: If I feel someone has committed a crime and evidence proves that they have, I am for it.

Prosecutor: So you are not against the death penalty? Let me get this straight in my mind.

Venireperson Jones: Okay.

Prosecutor: Question Number 41 asks you "Which of the following best describes the way you personally feel about the death penalty?" And you checked "Generally against the death penalty"?

Venireperson Jones: Yes.

Prosecutor: Okay. Maybe I need a little additional explanation on that.

Venireperson Jones: Generally against, in that I just feel that, you know, I would have to listen and find out, do I really believe that the person committed the crime and whether or not, you know, what type of crime it was, did they really do it? If so, there are cases that I would feel that, yes, they should receive the death penalty. And there are cases that I think they shouldn't.

(Questions omitted)

Prosecutor: Our law provides that if a person has committed a murder during the course of the commission of another felony, such as robbery, that is the type of case that the jury can consider giving the guilty person the death penalty.

What do you think about that?

Venireperson Jones: I think it's fair.

Prosecutor: Okay. Do you think that is the kind of case where you personally could consider giving someone the death penalty?

Venireperson Jones: Yes.

Prosecutor: What kind of cases would you be against the death penalty in?

(Objection by defense, overruled by trial court)

Venireperson Jones: I really don't know. I haven't thought about anything like this.

Prosecutor: Is your general opposition to the death penalty something that triggers a general religious or moral, or what is it in you that triggers a general opposition to the death penalty?

Venireperson Jones: More religious.

Prosecutor: How so?

Venireperson Jones: (No response.)

Prosecutor: How does your religion in you trigger a general opposition to the death penalty?

Venireperson Jones: More so, let God take care of it.

Prosecutor: If you were selected to serve on a jury in which the State was arguing for the death penalty, would you feel an obligation to let God take care of it rather than you yourself being able to vote such that the death penalty would be assessed to the death penalty?

Venireperson Jones: Let God take care of it.

Prosecutor: So if you were on a jury – let's picture this for a second.

You are on a jury, and you found someone guilty of capital murder. And the way our trial works, if someone is found guilty of capital murder, we have a second phase to the trial in which the death penalty is an option that the jury could decide. Supposing you were serving on a jury and you had found a defendant guilty of capital murder, you found that they committed a capital murder, and one of the options is they receive the death penalty, would you find yourself wanting to vote in such a way so that the death penalty was not assessed so that God could take care of it?

Venireperson Jones: Yes.

Prosecutor: And that is something that you – that is a religious belief that you hold; is that right?

Venireperson Jones: Yes.

Prosecutor: That is a religious belief that you have held for a long period of time?

Venireperson Jones: Yes.

Prosecutor: Is that a religious belief that you feel is deep seated within you?

Venireperson Jones: Yes.

Prosecutor: In addition to your basic religious opposition to the death penalty, do you have a moral opposition to it that goes along with the religious opposition?

Venireperson Jones: No.

Prosecutor: Do you think that, given the way you feel about the death penalty, that you might not ought to serve on a death penalty jury, that it might be best left to someone other than yourself?

Venireperson Jones: Yes.

Prosecutor: The law certainly doesn't require that you serve on this jury. All the law requires is that you be able to follow an instruction from the court. And if following an instruction from the Court to do something would violate your religious views, you don't have to do it. It's your views, and no one is going to try to change those. That's what we are talking about here today. We are trying to find out how you think about things so you can tell us, so the Judge can make a decision whether or not you have to serve on this jury. And if you have an opposition to the death penalty such that you don't feel like you could serve on the jury, then you shouldn't be required to.

Venireperson Jones: Okay.

Prosecutor: Is that how you feel?

Venireperson Jones: Yes.

Prosecutor: Do you feel like that's left to someone else and that you would be a better juror in some other kind of case, which you have recently?

Venireperson Jones: Yes.

Prosecutor: I take it that your religious feeling about the death penalty is such that following instructions from the Court to give the death

penalty consideration would violate your conscience or your religious views, something like that; is that right?

Venireperson Jones: Yes.

R. V – 8-13.

The defense then questioned Ms. Jones:

Defense Attorney: If you were chosen to serve in a case that is a capital murder case where the death penalty could be assessed, that doesn't necessarily mean it would be assessed but could be assessed, do you feel that you have a civic responsibility to serve in distasteful cases as well as cases that you might enjoy serving on?

Venireperson Jones: Yes.

Defense Attorney: And even though you feel strongly about or generally against the death penalty, can you imagine a case where the facts would be so horrible and where the law permitted that you could in good conscience vote for the death penalty?

Venireperson Jones: Could you repeat the question, please?

Defense Attorney: Yes, can you imagine a case where the facts would be so horrible and where the law permitted it, do you feel under those circumstances that you could vote for the death penalty if that were the law – what you were instructed that the law was?

Venireperson Jones: Yes.

Defense Attorney: Do you feel that you could?

Venireperson Jones: Yes.

R. V – 14-15

and

Defense Attorney: If you were chosen to serve as a juror in a capital murder case such as this one, would you be able to listen and give fair consideration to all of the evidence that was presented by both the State and the Defendant?

Venireperson Jones: Yes.

Defense Attorney: And based on that, would you be able to follow the Court's instruction at the conclusion of the case and determine what in your mind would be a rightful decision?

Venireperson Jones: Yes.

Defense Attorney: And if that decision included finding that the Defendant was guilty, would you be able to answer those questions up there without violating your conscience?

Venireperson Jones: Yes.

Defense Attorney: And even though you admittedly feel that there are some cases where capital punishment or death is a proper decision, there are a lot of cases that would be a capital case, perhaps, that you may not feel that way: is that correct?

Venireperson Jones: Yes.

Defense Attorney: And even though it might be a painful situation for you to serve in a capital murder case, do you think you could do that and would do that and follow the Court's instructions?

Venireperson Jones: Yes, I would.

Defense Attorney: And if those instructions resulted after you answered the questions or after the trial was completely over, if those answers of the questions resulted in the Defendant receiving the death penalty, would you be able to do that.

Venireperson Jones: Yes.

R. V – 16-17.

Following the voir dire examination by the Defense, the State challenged Ms. Jones for cause, on the ground that "she has a conscious objection to the death penalty that goes to prevent or substantially impair her service as a juror in a capital case." R. V – 19. The trial court granted the State's challenge. R. V – 20. The Appellant objected to the granting of the State's challenge for cause which was overruled by the court. The trial court granted the State's challenge, and excused Ms. Jones from service. R. V – 21.

REASONS FOR DENYING THE WRIT

I. Petitioner's Contention.

Petitioner contends that the opinion of the Court of Criminal Appeals misapplies and misapprehends this Court's holding in *Wainwright v. Witt*, 469 U.S. 412 (1985). Specifically, the State's Petition alleges that the Court of Criminal Appeals: (1) expressly refuses to consider the entire voir dire or to accord the trial court due difference; and (2) has resurrected the "high burden of proof" of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), which was

repudiated by this Court in *Adams v. Texas*, 448 U.S. 38 (1980).

II. Summary of Appellant's Response.

At the heart of the State's complaint is the fact that the Court of Criminal Appeals disagreed with the trial court's ruling that venireperson Jones was disqualified from serving on the jury due to her reservations about the death penalty. Nothing in the opinion by the Texas Court of Criminal Appeals is contrary to the holdings of this Court in *Wainwright v. Witt* or *Adams v. Texas;* indeed, the Appellant maintains that it is the State's position as expressed in its petition for writ of certiorari which is contrary to the spirit and intention of the holding of this Court in *Adams, Witherspoon,* and their progeny.

The decisions of this Court in *Adams v. Texas* and *Wainwright v. Witt* set the standards to be applied in a capital case for evaluating a challenge for cause based on the veniremember's personal opposition and/or qualms regarding the death penalty. Under *Adams* and *Wainwright* the test to be used in disqualifying a prospective juror in death penalty cases is whether that juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841, 851 (1985). Irrespective of his or her personal beliefs or opinions concerning the propriety of the law, so long as these views do not "substantially impair" him or her from discharging his duty, he or she may not be disqualified for cause. *Lockhart v. McCree,* 476 U.S. 162, 176, 106 S.Ct. 1758, 1766, 90 L.Ed.2d 137 (1986).

In the selection of a jury in a capital murder trial there are three potential categories of veniremembers: (1) those who are clearly and unambiguously either able to follow the law and the trial court's instructions; (2) those who are clearly and unambiguously unable to follow the law and the trial court's instructions due to their feelings about the death penalty; and (3) those whose responses are unclear, undecided and/or ambiguous. Prior to the Court's decisions in *Adams* and *Wainwright* only those members of the venire who fell into category (2) were subject to a challenge for cause, under the authority of *Witherspoon v. Illinois*. *Adams* and *Wainwright* did away with the requirement that a potential juror's inability to follow the law and the trial court's instruction be "unmistakably clear", and held that a trial court had wide discretion in ruling on a challenge for cause with regard to category (3) venire members.

The State's petition is based on the premise that voir dire of veniremember Elaine Jones placed her in category (3); however, the Respondent maintains that there was nothing ambiguous or unclear in Ms. Jones' examination about her ability and willingness to follow the law and the trial court's instructions, and that the finding by the Court of Criminal Appeals that Ms. Jones' exclusion for cause is not supported by the record was correct and in accord with this Court's decisions in *Adams, Wainwright,* and their progeny.

III. Application in the instant case.

An examination of the State's voir dire makes it obvious that the State, instead of conducting an impartial

examination of Ms. Jones' qualifications, took her by the hand and forcefully attempted to lead her down the path to disqualification.

Although the prosecutor tried his best, Ms. Jones' responses did not disqualify her from serving on the jury. Although she stated that she personally would prefer to "let God take care" of punishment, she further stated:

> (1) She believed in the death penalty for certain types of crime. R. V – 9.
>
> (2) Murder during the commission of a robbery was the type of crime for which she could personally consider giving someone the death penalty. R. V – 9-10.
>
> (3) She could follow the law with regards to her consideration of the death penalty. R. V – 15.
>
> (4) She would be able to listen and give fair consideration to all of the evidence that was presented by both the State and the Defendant. R. V – 16.
>
> (5) She would be able to follow the court's instruction, and be able to answer the Special Issues without violating her conscience. R. V – 16-17.

Ms. Jones never stated that her beliefs would not allow her to follow court's instructions in deciding punishment. To the contrary, she expressly stated that she would have no problems with following the law and the court's charge regarding capital punishment.

However, the trial court granted the State's challenge for cause, stating that "her religious scruples would affect her ability to be a fair and impartial juror." R. V – 20.

In reversing the decision of the trial court, the Court of Appeals stated:

> It is the burden of the challenging party to establish the venireman he has challenged for cause will be substantially impaired in his ability to follow the law.[1]* Demonstrating that the venireman has conscientious scruples against the death penalty is not alone sufficient to meet the State's burden to show he will be substantially impaired from honestly answering the special issues of former Article 37.071(b) in accordance with the evidence. In order to meet the burden, the State should directly ask the question of the venireman whether his opposition to the death penalty is such as to cause him to answer one of the special issues in such a way as to assure a life sentence will be imposed, irrespective of what the evidence may be. Once that question is asked, the trial court's task is clear. If the venireman steadfastly maintains he will not consciously distort his answer to special issues, he has shown no inability to follow the law, and may not be excused on State's challenge for cause.* A venireman who steadfastly maintains he will consciously distort his answers *must* be excused on a challenge for cause.* Under either contingency, the trial court has no real discretion, for the venireman has unequivocally shown, in the former, that he can follow the law, and in the latter, that he cannot.

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[1] *Indicates cites omitted.

On the other hand, once the question is asked, the venireman who genuinely equivocates or vacillates in his answer may be excused for cause or not, depending on demeanor, intonation, or expression. Here the trial court's discretion comes fully into play.* However the trial court exercises its discretion under these circumstances, it will be upheld on appeal.*

Under questioning by the State, Jones testified that she was "somewhat" against the death penalty on moral grounds, but that her opposition was "more religious." She even acknowledged that she "would . . . find [herself] wanting to vote in such a way so that the death penalty was not assessed so that God could take care of it." But all of this was before the operation of the special issues was explained to her. In fact, the State neither explained the capital punishment procedure to Jones nor made the critical inquiry of whether her apparent preference to "let God take care of" deciding who should suffer the death penalty would affect her ability honestly to answer the special issues without conscious bias or distortion in accordance with the evidence. Only appellant's counsel even came close to asking the question. Moreover, when he did, Jones answered unequivocally that she could follow the court's instructions and answer the questions even if that resulted in the imposition of the death penalty. Under these circumstances the trial court could not rationally have concluded that the State had discharged its burden to show that Jones was unable to abide by the statutory

> scheme, notwithstanding her preference to "let God" make that kind of ultimate decision.

Clark v. State, 929 S.W.2d at 8-9.

IV. Rebuttal of State's contentions.

The State contends that the Court of Criminal Appeals erred by focusing on a few specific answers, rather than considering the voir dire in its entirety. The opinion of the Court of Criminal Appeals makes clear that they did consider the entire voir dire. What the Court of Criminal Appeals found was that nowhere in the record did Ms. Jones ever say that her personal feelings about the death penalty would prevent or impair her from being a fair and impartial juror. She clearly stated that she could follow the law and the trial court's instructions and truthfully answer the special issues submitted to the jury.

What Ms. Jones did express was a personal reluctance to sit in judgment on another, especially in situation involving the death penalty. This Court has never held that a potential juror was disqualified from serving on a jury in a capital case merely because they express disagreement with the death penalty, or would be uncomfortable with sitting on a jury where they might have to make a decision which could lead to imposition of such a punishment – to the contrary, this Court has explicitly held that a person may not be struck merely because they are personally opposed to the death penalty. In *Adams v. Texas* this Court stated:

> [N]either emotional involvement, nor inability to confirm any effect whatsoever is equivalent to an unwillingness or inability on

> the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments. Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.
>
> *Adams v. Texas*, 448 U.S. at 50.

The State makes much of this Court's language in *Wainwright v. Witt* regarding the deference due to the trial court, and the "presumption of correctness" of the trial court's ruling on a challenge to exclude a veniremember for cause. However, a trial court does not have unlimited, unreviewable authority to grant or to deny a challenge for cause; the decision of the trial court must be "fairly supported" by the "record considered as a whole". *Wainwright v. Witt*, 469 U.S. at 433.

In the situation of an ambiguous or marginal voir dire, deference is given to the trial court's ruling, due to

his position to evaluate such factors and demeanor and intonation. The State's petition cites the language of this Court's decision in *Wainwright v. Witt*:

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. . . . many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. *Despite this lack of clarity in the printed record,* however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. (Emphasis added.)

Wainwright v. Witt, 469 U.S. at 424-425.

What the State chooses to ignore is that this "due deference" accorded the trial court's ruling is intended to apply in ambiguous, unclear, or marginal situations. Contrary to the State's version of the voir dire, this is not an instance where a veniremember vacillates, where they go back and forth concerning their ability to correctly follow the court's instructions and apply the law, or where there is no clear assertion that they would or would not be able to serve as a fair and impartial juror. The Court of Criminal Appeals correctly found that the trial court's striking Ms. Jones for cause was not supported by the record as a whole.

Neither does the decision of the Court of Criminal Appeals "resurrect" the "high burden of proof" of *Witherspoon v. Illinois.* Although Witherspoon primarily held that member of the venire could not be excluded "simply because they voiced a general objection to the death penalty or expressed conscious or religious scruples against its infliction", *Witherspoon v. Illinois,* 391 U.S. at 522, it was interpreted by "later cases in lower courts" to mean that "a veniremember may be excluded only if he or she would 'automatically' vote against the death penalty, and even then this state of mind must be 'unambiguous', or 'unmistakably clear.' " *Wainwright v. Witt,* 469 U.S. at 419.

An impartial jury is one which can follow the law and the instructions of the trial court, regardless of their feelings for or against the death penalty.

There are three potential categories of veniremembers: (1) those who clearly and unambiguously are able to follow the law and the trial court's instructions; (2) those who are clearly and unambiguously unable to follow the law and the trial court's instructions due to their feelings about the death penalty; and (3) those whose responses are unclear, undecided and/or ambiguous.

Under *Witherspoon* only those veniremen who are in category (2) could be excluded for cause. This Court's repudiation of the "unmistakably clear" standard in *Adams v. Texas* was based on the realization that the State had a right to "insist . . . that the jurors will consider the facts impartially and consciously apply the law as charged by the court." *Adams v. Texas,* 448 U.S. at 44.

However, while the State has a right to require that a juror be able to follow the law and the court's instructions, a potential juror cannot be excused for cause because they express qualms about capital punishment, as the jury obtained "would not be the impartial jury required by the Sixth Amendment, but rather a jury 'uncommonly willing to condemn a man to die.' " *Wainwright v. Witt*, 469 U.S. at 418, quoting *Witherspoon v. Illinois*, 391 U.S. at 521. As long as a juror is able to follow the law and the trial court's instructions, he cannot be struck for cause no matter how strong his feelings against the death penalty may be.

Adams v. Texas and *Wainwright v. Witt* addressed the problems with veniremembers whose responses fall into category (3), and it is there that "due deference" is to be given to the trial court.

Ms. Jones was not a category (3) juror. While she expressed personal qualms about the death penalty and a reluctance to pass judgment on a person where the death penalty was involved, she clearly stated that she could follow the trial court's instructions even if doing so resulted in the imposition of the death penalty. However, the State attempts to place her in category (3) by saying, in effect, "hey, she could be lying."

The State would interpret this Court's language regarding the deference due a trial court's ruling on a venireperson's exclusion as requiring that a reviewing court accept the trial court's determination regardless of whatever is contained in the record:

> . . . the Texas Court of Criminal Appeals opinion erroneously refuses to contemplate

> what would happen if the trial court simply does not believe the veniremember's answer to "the critical inquiry".
>
> State's Petition for a Writ of Certiorari, p. 25.

Under the State's theory of "due deference", the mere possibility that a potential juror *could* be lying would render a trial court's decision unreviewable. This interpretation is in direct opposition to this Court's holding that the exclusion of a venireperson must be supported by the record.

The State fails to show any action or response of Ms. Jones which would indicate that she was lying about the critical determination (whether or not she could and would follow the law and the trial court's instructions) which was ignored by the Court of Criminal Appeals. The court's holding that the disqualification was unjustified was not based on her answer to one specific question, but on the voir dire as a whole. The State did not explain the sentencing procedures in a capital case to Ms. Jones, nor did it explain what was expected of her and inquire as to whether she could fairly and impartially perform her duties as a juror. The State's questioning dealt with her personal feelings and potential qualms about the death penalty – feelings and qualms which she was absolutely entitled to have as a selected juror, and which can't, in and of themselves, justify her excusal for cause from serving on the jury.

CONCLUSION

The State of Texas' petition for a writ of certiorari should be denied.

Respectfully submitted,

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